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April 29, 2014

<u>Via Certified Mail – Return Receipt Requested</u> Scott Mroz Sedgwick LLP 333 Bush St., 30th Fl. San Francisco, CA 94104	<u>Via Certified Mail – Return Receipt Requested</u> Debbie Raphael, Director Cal. Department of Toxic Substances Control P.O. Box 806 Sacramento, CA 95812-0806
<u>Via Certified Mail – Return Receipt Requested</u> Gina McCarthy Administrator Environmental Protection Agency 1200 Pennsylvania Avenue, N.W. Washington, DC 20460	<u>Via Certified Mail – Return Receipt Requested</u> Jared Blumenfeld Region 9 Administrator Environmental Protection Agency 75 Hawthorne Street San Francisco, CA 94105
<u>Via Certified Mail – Return Receipt Requested</u> Matt Rodriquez Secretary for Environmental Protection Cal. Environmental Protection Agency P.O. Box 2815 Sacramento, CA 95812-2815	<u>Via Certified Mail – Return Receipt Requested</u> Linda Y.H. Cheng Agent for Service of Process Pacific Gas & Electric Company 77 Beale Street, 32nd Floor San Francisco, CA 94105
<u>Via Certified Mail – Return Receipt Requested</u> Executive Director State Water Resources Control Board P.O. Box 100 Sacramento, California 95812	<u>Via Certified Mail – Return Receipt Requested</u> Executive Officer Regional Water Quality Control Board San Francisco Bay Region 1515 Clay Street / Suite 1400 Oakland, CA 94612

Re: Notice of Intent to Sue Under the Resource Conservation and Recovery Act and
Clean Water Act¹

To Whom It May Concern:

This letter constitutes the NOTICE OF INTENT TO SUE Pacific Gas & Electric Company ("PG&E") of Dan Clarke ("Clarke") and the San Francisco Herring Association ("SFHA," collectively with Clarke, "Noticers") for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6972 *et seq.* and the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.* arising out of PG&E's operation of manufactured gas plants ("MGPs") in the present day Marina and Fisherman's Warf neighborhoods of San Francisco, CA and PG&E's disposal of the residue generated thereby. Specifically, this letter gives notice of Noticers' intent

¹ If you are represented by counsel in this matter, request is specifically made that this communication be directed to such counsel, and this communication shall be deemed to have been made directly to such counsel.

to seek redress for the contamination by MGP residues of soil and groundwater on Clarke's property located at 1625 North Point St. ("Property") and the illegal discharge of pollutants leached from MGP residues into the waters of the San Francisco Bay.

I. Persons Giving Notice

Clarke, with his wife, is the owner, through a living trust, of the Property. Clarke's Address is at 1625 North Point St., San Francisco, CA 94123. His phone number is (415) 775-7773. Clarke can be contacted through the undersigned counsel at the address and phone number above.

SFHA is a California non-profit, unincorporated association whose membership consists of active San Francisco Bay commercial herring fishermen and buyers. SFHA was formed to protect its members' access to the San Francisco Bay commercial herring fishery and otherwise advocate on behalf of its members' activities related to herring fishing. SFHA's membership is predominantly made up by active commercial herring fishermen, all of whom are small independent business owner/operators. SFHA's address is 4138 Howe St., Apt. E, Oakland, CA 94611. SFHA's phone number is (510) 882-6066. SFHA can be contacted through the undersigned counsel at the address and phone number above.

II. Person Responsible for the Alleged Violations:

PG&E as the owner and operator of MGPs formerly located in the Marina and Fisherman's Wharf neighborhoods of San Francisco, CA is responsible for the violations that give rise to this notice.

III. Location of the Violations

PG&E's violations have occurred and continue to occur at the following former locations of PG&E owned and operated MGPs.

1. North Beach MGP Site: The North Beach MGP Site is comprised of at least four city blocks bounded by Marina Boulevard, Buchanan Street, North Point Street, Laguna Street, Bay Street, and Webster Street, designated by the City and County of San Francisco Office of the Assessor-Recorder as Blocks 0459, 0460A, 0445A, and 0463B. The site also includes a triangular area of vacant land and paved parking (Marina Green) situated northeast of Marina Boulevard. PG&E operated the North Beach MGP near the area north of Bay and Buchanan Streets until at least April 1906, when it was destroyed in the Great Earthquake. The Property is located within the North Beach MGP Sites.
2. Fillmore MGP Site: The Fillmore MGP Site is comprised of at least four city blocks bounded by Fillmore Street, Cervantes Street, Mallorca Way, Pierce Street and Toledo Way, designated by the City and County of San Francisco Office of the Assessor-Recorder as Blocks 0462A, 0463A, 0466A, and 0467A. PG&E owned and operated the Fillmore MGP operated near the area west of Fillmore and Bay Streets until at least

April 1906, when it was destroyed in the Great Earthquake. The Marina Middle School is located on part of this site.

3. Beach Street MGP Site: The Beach Street MGP site is comprised of an area in the vicinity of Beach and Powell Streets in the Fisherman's Wharf area of San Francisco. PG&E owned and operated the MGP until at least the mid-1950s when the property was sold and redeveloped for commercial use. A hotel currently occupies portions of the site.

These sites are collectively referred to herein as "MGP Sites" and each of these sites is inclusive of the groundwater located therein or flowing there through.

IV. Dates of the Violations

The violations that are the subject of this notice began sometime prior to the year 1905 and are ongoing.

V. Description of PG&E's RCRA Violations

Pursuant to the 42 U.S.C. § 6972 of the RCRA, Noticers intend to sue PG&E for disposing of solid waste, in the form of MGP residue, in a manner that may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B). Liability under RCRA is retroactive, and the ongoing contamination resulting from PG&E's disposal of MGP residue and the ongoing discharges therefrom into groundwater, navigable waters, and air are illegal and subject to liability under the RCRA. 42 U.S.C. § 6972(a)(1)(I); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Fnd., Inc.*, 484 U.S. 49 (1987).

PG&E's placement of MGP residue at the MGP Sites, including the Property, constitutes disposal of solid waste under the RCRA. "Disposal" under the RCRA is defined to include the "discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste . . . into or on any land." 42 U.S.C. § 6903(3). MGP residue qualifies as a "solid waste," defined by the RCRA as a "discarded material . . . resulting from industrial, commercial, mining and agricultural operations." 42 U.S.C. § 6903(27).

The MGP residues placed by PG&E on the Property and on other locations on the MGP Sites indisputably present an imminent and substantial endangerment to health or the environment. However, Noticers need only show that the MGP residues "may" present such endangerment in order to show a violation of the RCRA. "Congress preceded the standard of liability with the term 'may,' to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." *Olson v. Beck*, 06-07487, 2011 U.S. Dist. LEXIS 114805, *57 (N.D. Cal. Oct. 5, 2011). Furthermore, "[e]ndangerment" means a threatened or potential harm and does not require proof of actual harm." *Id.*, at *57-58 (internal quotation omitted). "A finding of 'imminence' does not encompass a showing that actual harm will occur immediately so long as the risk of threatened harm is present. An endangerment need not be immediate to be 'imminent' and thus warrant relief. An endangerment is 'imminent' if factors giving rise to it are present, even though the harm may not be realized for years." *Id.*, at *58. "Substantial" does not require quantification of

the endangerment (e.g., proof that a certain number of persons will be exposed, that 'excess deaths' will occur, or that a water supply will be contaminated to a specific degree) . . . endangerment is substantial if there is some reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken." *Id.* at **58-59.

A. MGP Residue Disposed by PG&E on the Property and it May Present an Imminent and Substantial Endangerment to Health and/or the Environment

The Property is located within the North Beach MGP Site and is known to be contaminated with residues from that MGP. Specifically, the Property is a 0.08 acre parcel near the historic locations of the Purifier, Scrubber, and Generator buildings of the MGP. Observations and testing demonstrate that in the course of PG&E's operation of the North Beach MGP, MGP residue was disposed on the site and the soil of the Property has been contaminated thereby at levels that may present an imminent and substantial endangerment to health and/or the environment.

1. Observed "Black Rocks" in the Soil of the Property

Small and weathered "Black Rocks" are commonly observed on the surface in the Property's backyard and in shallow soil. They are all lightweight. Some are shiny and appear similar to raw, unprocessed coal, others are dull and crumbly, and some appear to be solids reformed from something once in the liquid state. Some of these rocks are the size of a baseball or bigger. There is historic evidence of a "coal bin" having been located in the vicinity of Property during MGP operations.

In March 2010, two larger-than-usual Black Rocks found by Clarke while gardening were handed over to PG&E. PG&E tested the larger Black Rocks in April and informed Clarke in early May that they contained MGP residues. Test results from the 2010 Black Rocks indicated their toxicity was very high.

Samples were taken from two different parts of one Black Rock and tested on two separate days by the same lab. The first tested for 16 polycyclic aromatic hydrocarbons ("PAHs") priority compounds considered standard for investigating MPG residue. The aggregate of the 16 PAHs was 1,206 parts per million ("PPM"). The second test looked at the same 16 PAH priority compounds plus 41 'daughter' compounds for a more exhaustive analysis. The results of the second test showed that an aggregate of the 16 priority PAHs equaled 9,010 PPM and that the aggregate of all 57 PAHs was 11,555 PPM. The PAHs identified in the Black Rocks including the following that are identified by the California Environmental Protection Agency ("Cal/EPA") as carcinogens: benzene, ethylbenzene, benzo(a)pyrene, benzo(a)anthracene, benzo(b)fluoranthene, benzo(k)fluoranthene, chrysene, dibenzo(a,h)anthracene, indeno(1,2,3-c d)pyrene, and naphthalene.

Another significant discovery of Black Rocks occurred in the summer of 2013, when an emergency sewer repair opened a small hole in the slab under the house. The hole revealed a

large cache of the larger Black Rocks. The 2013 Black Rocks have not yet been tested but visually they are very similar to the Black Rocks discovered on the Property in 2010.

2. Soil Testing on the Property

In July 2013, PG&E took soil samples from the Property. The soil testing revealed significant MGP contamination. It further showed that the contamination is widespread across the entire footprint of the Property. Benzo(a)pyrene equivalent ("B(a)P-EQ"), which aggregates benzo(a)pyrene with certain percentages of six other identified carcinogens, is an established measure used to screen samples for the degree of contamination. The Department of Toxic Substance Control ("DTSC"), a part of the California State Environment Protection Agency, uses Using 0.9 PPM as the target for screening B(A)P-EQ. All locations tested (18 of 18) had at least one value above this target screening level at some depth; and most of the samples (74 of 95) at any depth exceeded this target screening level. Furthermore, measured toxicity levels were higher than almost anywhere else in the Marina where test results have been made public.

PAHs found in significant quantities in the soil include: 1,2 benzphenanthracene (chrysene); acenaphthene; acenaphthylene; anthracene; benzo(a)anthracene; benzo(a)pyrene; benzo(b)fluoranthene; benzo(g,h,i)perylene; benzo(k)fluoranthene; bibenz(a,h)anthracene; fluoranthene; fluorene; indeno(1,2,3-cd)pyrene; naphthalene; phenanthrene; and pyrene. All but the last two are known carcinogens.

The PAHs found in the soils on the Property may present an imminent and substantial endangerment to health and/or the environment. The California EPA uses human health screening levels ("CHHSLs") which equate B(a)P-EQ to an incremental risk of cancer ("IRC"). According to the CHHSLs, a B(a)P-EQ of 0.038 PPM is equal to an IRC of 1:1,000,000 and B(a)P-EQ of 3.8 PPM is equal to an IRC of 1:10,000. B(a)P-EQ levels in soil on the Property were assayed as high as 1,149 PPM, a level exceeding one-hundred times the 1:10,000 IRC level. The breakdown of all 95 samples from the Property, relative to the 1:10,000 IRC level, is as follows: 4 exceeded one-hundred times, 21 exceeded ten times, 29 simply exceeded, and 41 were less than. Of the 41 that were less than, 20 were above and 21 below DTSC's target screening level. The samples that equate to the latter high IRC levels were found widespread across the Property and also near the surface. Furthermore, there were indications of Black Rocks, which had previously been shown to have high PAH content, found at the surface and in shallow soil.

Boring logs (visual observations and odors) plus photographs indicate remnants of Black Rocks are present throughout the Property, corroborating the conclusion of widespread contamination. In every location sampled (18 of 18), the Property's sandy soil contained material described in the results as: "clinker-like material (CLM)", "asphalt-like material (ALM)", "black nodules", "vitreous luster", "coal-like", "tar-like". The granularity of the suspect material varied from "fine to coarse gravel-sized." The density of the suspect material within the sandy soil varied from "trace" to "70%." In several instances the suspect material was described as accompanied by a "naphthalene-like odor." In addition, there was a noticeable occurrence of Black Rock fragments at those locations where chemical assays of soil samples showed toxicity

at high levels. One sample noted as "70% CLM" in the boring log was determined by chemical assay to be highly toxic with a B(a)P-EQ of 1,149.

B. MGP Residue Disposed by PG&E on the Property and/or at Other MGP Sites Have Migrated into Groundwater that Is Hydrologically Connected to the San Francisco Bay and Has Been Transported into the San Francisco Bay, and so May Present an Imminent and Substantial Endangerment to Health or the Environment

PG&E has affirmatively omitted testing of the groundwater on the Property and at other locations in the MGP Sites. However, testing at two other locations in the North Beach Site, with similar characteristics to the Property, indicated that groundwater had been contaminated as a result of MGP residue in the soil of those locations. The groundwater below the MGP Sites are hydrologically connected to the San Francisco Bay; thus, contamination in such groundwater flows into the Bay contaminating it. Furthermore, testing of another location in the North Beach MGP site abutting the San Francisco Bay indicated that toxic chemicals from MGP residue in soils upland of the Bay and in soils below water were entering into the waters of the Bay.

1. Groundwater Testing at the Marina Substation and the Gaslight Building Indicates that Groundwater Has Been Contaminated as a Result of MGP Residue Disposed by PG&E at the North Beach MGP Site and that Contamination Migrates Between Sites

A PG&E owned 0.25 acre parcel within the 9.5 acre North Beach MGP Site, which PG&E currently uses as a substation ("Marina Substation"), was tested for MGP residues in 1991. Soil and groundwater tests indicated that residues associated with the former MGP are present in on-site soils, especially saturated soils, and in groundwater underlying the site. The maximum total PAHs was 96.9 PPM in the unsaturated soil; 1,160 PPM in the saturated soil; and 3.51 mg/l in groundwater. Recommendations were made for investigation of the larger North Beach MGP Site because the source of PAHs in the groundwater and saturated soil was not believed to be *solely* from the smaller Marina Substation parcel.

A privately owned 0.3 acre parcel within the 9.5 acre North Beach MGP Site which previously functioned as headquarters of MGP operations ("Gaslight Building") was tested for MGP residues in 1997. Results of soil sampling indicated the presence of significant PAHs in shallow soil. The PAH levels exceeded the remediation goals for industrial sites. The contamination was attributed to a waste product of coal gasification found in abundance in shallow soils during testing of the Gaslight Building. The waste product was, erroneously it seems, termed 'lampblack' in 1997 and is now believed to be the same as, or very similar to, the Black Rocks found on the Property. Test results of groundwater samples taken from shallow soils at the Gaslight Building indicated the presence of PAHs at levels which were notable. Further, it was noted that the greatest PAH contaminant found in the shallow groundwater at the Gaslight Building was Naphthalene and that Naphthalene is the most water soluble of the PAH compounds.

The investigations at the Marina Substation and Gaslight Building lead to these conclusions: Groundwater is continuously being contaminated with PAHs from MGP Residues that have been deposited in soils at the MGP Sites. Primarily through the actions of groundwater, MGP contamination migrates between sites and moves mostly in the same direction as groundwater, which is northwest toward the San Francisco Bay. Along with the Property, the Marina Substation and the Gaslight Building were all within 300 feet of the historic shoreline and are now within 600 to 1000 feet of the present day shoreline. It is noted that unconfined groundwater is typically found 10 to 15 feet below the surface and the groundwater pore velocity is estimated to be 4.2 feet/day at these locations.

2. PG&E Has Affirmatively Omitted Testing Groundwater at Any Location in the MGP Sites Despite Requests from a California State Regulatory Agency and from Its Own Consultant and thereby Has Allowed the Threat of Imminent and Substantial Endangerment to Health or the Environment to Persist for More Than Twenty Years

The Department of Toxic Substance Control ("DTSC"), a part of the California State Environment Protection Agency, reviewed the results of the 1991 Marina Substation tests and wrote a strongly worded letter to PG&E stating that further action was necessary. The same conclusion was made by the consulting company that PG&E hired to do the investigation. The evidence indicated that contamination existed not just at the small Marina Substation site but at other locations in the 9.5 North Beach MGP Site as well, and that groundwater played a role in its migration. Despite this, PG&E took no action for twenty years.

Although PG&E was consulted during the 1997 Gaslight Building testing, that investigation was not done by PG&E nor was it done in response to the 1991 call for PG&E to take further action. Rather, it was done by the principals to facilitate the transfer of the Gaslight Building between two sophisticated real estate companies where a mortgage lender was reported to be nervous about possible future liabilities. The 1997 testing resulted in remediation for soil contamination. Dirt was removed and replaced in a narrow landscaping strip along one side of the Gaslight Building.

It was not until 2011, twenty years after the call for action, that PG&E returned to test the Marina Substation for MGP Residues. However, PG&E tested the soils but did not test the groundwater. In fact, PG&E is apparently not testing groundwater anywhere in the MGP Sites. The 2011 test results at the Marina Substation again indicated significant levels of PAHs in the soils. A remediation is currently planned that consists solely of a land use covenant ("LUC"). The LUC will require DTSC approval for any future excavations at the Marina Substation since digging in contaminated soils could threaten health. There is apparently no remediation planned for the groundwater contamination previously found at the site.

In 2010, PG&E embarked on what it called an environmental project ("EP") in the Marina. The EP consists of testing and remediating private properties where the owner agrees to these actions. As above, PG&E is testing only dry soils and not groundwater or saturated soils. The EP targets private properties with back yards and gardens. Most of the properties tested thus

far, a dozen or so, have proven to have MGP contamination above CHHSLs, resulting in the requirement of at least some kind of remediation. Test plans do not call for testing under patios and slabs unless the owner insists. When tests are conducted under patios and slabs, MGP contamination is usually found. Contaminated soils under slabs and patios, however, are excluded from remediation. Often patios are extended or extra soil is brought in during the remediation to cover contamination that has been found. Sometimes contaminated soils in uncovered areas of a back yard are dug out and replaced with clean fill – but only to a certain depth. Almost always, the remediation includes an LUC to cover the contamination left behind in deeper soils and under patios and slabs.

These affirmative omissions by PG&E result in a substantial amount of contamination remaining post remediation that may present a substantial endangerment to health and/or the environment; and PG&E's refusal to even test groundwater, saturated soils, and dry soils in certain locations suggests an intentional effort by PG&E to avoid gaining knowledge concerning the contamination thereof. This is particularly troubling in light of the statement in the 1991 letter from DTSC that both groundwater and soil are contaminated with substances known to cause cancer and the site poses a potential threat to health and the environment, and the request therein for a comprehensive analysis of soil and groundwater across the North Beach MGP site. If further ignores that water moves underground, whether there is a barrier on the surface or not, and flows into the San Francisco Bay.

3. Groundwater Below the MGP Sites Are Hydrologically Connected to the San Francisco Bay Transporting Toxic Contaminates from MGP Residue into San Francisco Bay

The MGP Sites are located in San Francisco's Northshore Groundwater Basin. All seven groundwater basins in San Francisco Bay open to either the Pacific Ocean or the San Francisco Bay. The Northshore Groundwater Basin is open to the San Francisco Bay. Groundwater in the Northshore Groundwater Basin flows to the North into the Bay and is known to be subject to seawater intrusion. All of the MGP Sites sit, in whole or in substantial part, beyond the historical shoreline of the Bay on fill that has a very shallow groundwater table, located less than 10 or 15 feet below the surface. This groundwater is hydrologically connected to the San Francisco Bay flowing into the Bay, transporting MGP residue disposed by PG&E on the MGP Sites into the Bay.

4. Testing at Gashouse Cove Showed it Is Contaminated with MGP residue and that MGP Contamination, Is Continuing to Enter the San Francisco Bay from MGP Residue Disposed by PG&E in Soils Upland of the Bay and Beneath the Water

The small boat harbor ("Gashouse Cove"), an inlet of San Francisco Bay under the jurisdiction of the City and County of San Francisco ("CCSF"), borders the North Beach MGP Site. Gashouse Cove contains MGP residues that have been the cause of a dispute between CCSF and PG&E for some time. CCSF conducted studies of contamination in the sediment in

1994, 1995, 1997, 1998, and 2000. In 2001, CCSF filed a federal lawsuit against PG&E over the anticipated cost of remediation. In 2004, the suit was dismissed without prejudice as premature since the extent of damages had not yet been fully defined. In the ten years since, studies have been conducted to determine the extent of contamination – limited, however, to within the harbor – and a plan for remediation all without signs of imminent resolution. If and when Gashouse Cove is dredged, there are apparently no plans to test for contamination in sediment along adjacent shorelines under state and federal jurisdictions: i.e., next to the Marina Green breakwater and under the piers of Fort Mason, respectively.

One of the studies conducted in the last ten years examined the immediate shoreline to look for upland sources which might re-contaminate Gashouse Cove after dredging. Soil samples were taken from the CCSF-owned portion of the shoreline bordering Gashouse Cove. (The shoreline on federally owned Fort Mason, which also borders Gashouse Cove, was not included.) This study, in 2008, found a significant deposit of coal-tar in an area near a plume of PAHs with the highest degree of contamination that has been mapped in the Gashouse Cove sediment. The coal-tar was found deeper than twenty feet at a location where the water table is believed to be less than seven feet. Groundwater was not tested in this study nor was there any discussion of the role groundwater plays in migration of contaminants. As to the degree of contamination, the PAHs measured in the coal-tar and the maximum measured in Gashouse Cove sediment are comparable with that of soil samples from the Property.

The overarching conclusion from studies in and around Gashouse Cove is that MGP residues in upland sources and in the sediment of Gashouse Cove have and continue to contaminate the San Francisco Bay.

5. Herring Commonly Spawn in Nearshore Waters in Close Vicinity of the MGP Sites and Fertilized Herring Eggs and Larval Herring Are Well Known to Suffer Mortal Effects from PAH Contamination

Every year, herring return to the San Francisco Bay to spawn. Like many anadromous fish, the herring that return to the Bay were born in the Bay. Furthermore, a herring born in the Bay will return to spawn in the bay in as many as eight subsequent seasons. Thus, a loss of fertilized herring eggs or larval herring can have significant negative population consequences almost indefinitely into the future.

Herring traditionally spawn—laying their eggs to be fertilized, develop, and hatch into larval herring—in substrate along the San Francisco waterfront, including areas in the immediate vicinity of each of the MGP Sites.

Scientific research—including by the National Marine Fisheries Services and the California Department of Fish and Wildlife—has shown that when fertilized herring eggs and larval herring are exposed to water contaminated with PAHs, very significant levels of mortality occur. In a process known as phototoxicity or photo enhanced toxicity, PAHs are uptaken into the cells of fertilized herring eggs and larval herring. Fertilized herring eggs and larval herring are translucent; thus, sunlight enters the cells of fertilized herring eggs and larval herring.

Research has shown that when the cells of fertilized herring eggs and herring larvae containing PAHs are exposed to sunlight, a chemical reaction occurs, causing the oxygen molecules contained within such cells to reverse their orientation. Once reversed these oxygen molecules essentially burn the cells from the inside out, causing dramatic and generally mortal mutations in affected fish.

The foregoing list of RCRA violations is not exhaustive. Noticers intend to include in their lawsuit additional violations, legal or factual, revealed in the course of investigation or discovery.

VI. Description of PG&E's CWA Violations

The facts described in the foregoing sections are incorporated by reference here to the same extent as if repeated in full.

Pursuant to sections 505(a) and (b) of the CWA, 33 U.S.C. §§ 1365(a)-(b), Noticers intend to sue PG&E for violating, and continuing to violate, effluent standards and limitations as defined under section 505(f) of the CWA, 33 U.S.C. § 1365(f), by discharging pollutants into the waters of the United States without a permit required by CWA section 301(a), 33 U.S.C. § 1311(a).

The CWA prohibits the discharge of pollutants from a point source to the waters of the United States except when pursuant to, and in compliance with, a permit.² See 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. The Act defines "pollutant" to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The CWA defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source" and "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). This includes "discharges to navigable surface waters via hydrologically connected groundwater." *Northwest Env'tl. Def. Ctr. v. Grabhorn, Inc.*, No. 08-0548, 2009 U.S. Dist. LEXIS 101359, at *34 (D. Or. Oct. 30, 2009). "Point source" is defined by the CWA as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

The toxic chemicals from the MGP residues located in the soil of the MGP Sites qualifies as a pollutant, as they contain carcinogenic PAHs that are known to be harmful to marine life, including without limitation fertilized herring eggs and larval herring. Indeed, several of the PAHs known to exist in the MGP residues located on the MGP Sites are on a list of identified "toxic pollutants" issued by the EPA. These include: acenaphthene; fluoranthene; and

² The State of California was delegated authority by the Environmental Protection Agency to administer the National Pollution Discharge Elimination System ("NPDES") permit program pursuant to 33 U.S.C. § 1342(b).

naphthalene. *See* 40 C.F.R. § 401.15. The CWA defines “toxic pollutants” as “those pollutants, or combinations of pollutants . . . which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will . . . cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.” 22 U.S.C. § 1362(13). This definition is on all fours in relation to PAHs and their effects on fertilized herring eggs and larval herring.

The MGP Sites on which the MGP residues were disposed by PG&E qualifies a point source of these pollutants. The San Francisco Bay—into which these pollutants are discharged either via the groundwater that flows through these MGP Sites into the Bay or directly via contaminated soils on the Bay’s shoreline, tidelands or submerged lands—qualifies as navigable waters of the United States.

The foregoing list of CWA violations is not exhaustive. Noticers intend to include in their lawsuit additional violations, legal or factual, revealed in the course of investigation or discovery.

Noticers believe that this Notice of Intent to Sue sufficiently states grounds for filing suit under both the RCRA and the CWA. Each day the above-described violations are not remedied constitute a separate violation under the applicable regulations and PG&E will remain in violation until the contamination described is not remedied. The CWA and 40 CFR § 19.4 authorizes penalties up to \$137,500/day for each violation of the CWA. The RCRA and 30 CFR § 19.4 authorizes penalties of up to \$27,500/day for each violation of the RCRA. At the close of the 60-day CWA notice period and the 90-day RCRA notice period, Noticers intend to file a citizen suit against PG&E for the violations discussed above. Noticers intend to seek injunctive relief, penalties, attorneys’ fees and costs, including expert witness fees.

During the notice periods, Noticers will be willing to discuss effective remedies for the violations noted in this letter.

Very Best,



STUART G. GROSS

SG:ksa